No. 96-915

Supreme Court, U.S.
FILED
FEB 6 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Associated Industries of Florida, Inc. and
Philip Morris, Inc.

Petitioners,

v.

Agency For Health Care Administration, State of
Florida Department of Business and Professional
Regulation, and State of Florida

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Laurence H. Tribe
Jonathan S. Massey
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Wayne Hogan
Brown, Terrell, Hogan,
Ellis, McClamma &
Yegelwel
233 East Bay Street
Jacksonville, FL 32202
(904) 632-2424

Robert A. Butterworth
Attorney General
Counsel of Record
The Capitol, Ste. PL-01
Tallahassee, FL 32399
(904) 488-9935

Dexter Douglass
General Counsel
Executive Office of the
Governor
The Capitol, Ste. 209
Tallahassee, FL 32399
(904) 488-3494

February 6, 1997

Additional counsel listed inside cover

29 pp

W.C. Gentry
Gentry and Phillips
6 East Bay Street, Ste. 400
Jacksonville, FL 32202
(904) 356-4100

Parker D. Thomson
Thomson, Muraro, Razook
& Hart, P.A.
One Southeast Third Avenue
Miami, FL 33131
(305) 350-7200

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 11

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: **Page**

Alfred L. Snapp & Son, Inc., v. Puerto Rico, 458 U.S. 592 (1982) 16
Ashland Oil and Refining Co. v. General Telephone Co., 462 S.W.2d 190 (Ky. Ct. App. 1970) 20
Bishop v. Nielsen, 632 P.2d 864 (Utah 1981) 20
Branch v. United States, 69 F.3d 1571 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996) 13
California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) 23
City of New Orleans v. Duke, 427 U.S. 297 (1976) 12
Dale v. Whiteman, 202 N.W.2d 797 (Mich. 1972) 20
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 21
General Motors Corp. v. Romein, 503 U.S. 181 (1992) 21
Great American Ins. Co. v. United States, 575 F.2d 1031 (2d Cir. 1978) 17
Green v. American Tobacco Co., 154 So.2d 169 (Fla. 1963) 1
Hawkins v. Bleakly, 243 U.S. 210 (1917) 12
Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412 (D.C. Cir. 1994) 19
Holbrook v. Anderson Corp., 996 F.2d 1339 (1st Cir. 1993) 19
Industrial Risk Insurers v. Creole Production Serv., 746 F.2d 526 (9th Cir. 1984) 17
Jones v. Kinney, 113 F. Supp. 923 (W.D.Mo. 1953) 21
Joseph v. Quest, 414 So.2d 1063 (Fla. 1982) 20
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 12
Manigault v. Springs, 199 U.S. 473 (1905) 21
Martinez v. California, 444 U.S. 277 (1980) 12
Miller v. De Witt, 226 N.E.2d 630 (Ill. 1967) 20
Moore ex rel Mississippi v. The American Tobacco Co., No. 94:1429 (Ch. Ct., Jackson Co., Miss.) 18

Cases (continued): **Page**

New York Central Co. v. White, 243 U. S. 188 (1917) 12
Oaklawn Jockey Club, Inc. v. Pickens-Bond Construction Co., 477 S.W.2d 477 (Ark. 1972) 20
Shor v. Paoli, 353 So.2d 825 (Fla. 1978) 20
Skinner v. Reed-Prentice Division Package Mach. Co., 374 N.E.2d 437 (Ill. 1977) 20
Smith v. Southern Farm Bureau Cas. Ins. Co., 174 So.2d 122 (La. 1965) 20
Sommer v. Federal Signal Corp., 593 N.E.2d 1365 (N.Y. 1992) 20
Trail Builders Supply Co. v. Reagan, 235 So.2d 482 (Fla. 1970) 20
United States v. Gera, 409 F.2d 117 (3d Cir. 1969) 19
United States v. Hunter, 645 F. Supp. 758 (N.D.N.Y. 1986) 19
United States v. Merrigan, 389 F.2d 21 (3d Cir. 1968) 19
United States v. Moore, 311 F. Supp. 984 (D. Pa. 1970), *rev'd on other grounds*, 469 F.2d 788 (3d Cir. 1972) 19
United States v. Salerno, 481 U.S. 739 (1987) 22
United States v. Theriaque, 674 F. Supp. 395 (D. Mass. 1987) 19
United States v. University Hospital, 575 F. Supp. 607 (E.D.N.Y. 1983) 16
United States v. Winstar, 116 S. Ct. 2432 (1996) 21
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 21
Westchester Light Company v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (N.Y. 1938) 16
Zarrella v. Miller, 217 A.2d 673 (R.I. 1966) 20

Statutory Provisions: **Page**

42 U.S.C. § 1396a(a)(25) 2, 12
42 U.S.C. § 2651 18
Section 409.910, Fla. Stat. 1, 3, 8, 9
Section 409.266, Fla. Stat. 2, 15
Section 409.2665, Fla. Stat. 1, 3, 4, 5
Section 768.81(3), Fla. Stat. 14
Ch. 69-106, Laws of Fla. 2
Ch. 69-268, Laws of Fla. 2
Ch. 78-433, Laws of Fla. 2
Ch. 82-159, Laws of Fla. 2
Ch. 92-93, Laws of Fla. 9

Miscellaneous: **Page**

Florida Department of Health and Rehabilitative Services, State Health Office, Family Health Service, *A Florida Health Status Report: Behavioral Risk Factor Surveillance System 1986-1992, cited in*, J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No.5, *Tobacco Use in Florida: Consequences and Costs* (September/October 1994) 5
Florida Department of Health and Rehabilitative Services, *Smoking Attributable Mortality, Morbidity, and Economic Costs: 1992 Report, cited in*, J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No. 5, *Tobacco Use in Florida: Consequences and Costs* (September/October 1994) 5, 6
When Statute of Limitations Commences to Run Against Claim For Contribution or Indemnity Based on Tort, 57 A.L.R. 3d 867(1996) 20

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Florida, the Agency for Health Care Administration, and the Department of Business and Professional Regulation respectfully submit this brief in opposition to the petition for writ of certiorari filed in this case by Associated Industries of Florida, Inc. and Philip Morris.

STATEMENT OF THE CASE

This case presents the question of the facial constitutionality of Chapter 94-251, Section 4, Laws of Florida ("1994 Amendments"), which amended Florida's Medicaid Third-Party Liability Act, Section 409.910, Fla. Stat. Petitioners' description of the 1994 Amendments and their legislative history is predictably partisan and one-sided. Far from being radical or unprecedented, the Amendments are only the latest statutes in a long series of efforts by the Florida legislature to carry out its federally mandated duty to recoup Medicaid payments from liable third parties.

1. Florida law has long recognized the rules of primary conduct that put a manufacturer on notice that it may be held accountable for all damages caused by its defective products. Over three decades ago, in *Green v. American Tobacco Co.*, 154 So.2d 169, 173 (Fla. 1963), the Florida Supreme Court declared:

> There exists . . . no real alternative and no valid objection to this distribution of the burden [to the manufacturer], if the public health is to be protected in

> any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

2. Under the Social Security Act, States are obligated to "take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the [state Medicaid] plan arising out of injury, disease or disability" and "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25). In 1970, the Florida Division of Family Services became the unit of the Florida government responsible for pursuing Medicaid third-party liability claims. *See* Ch. 69-268, § 1, Laws of Fla., and Ch. 69-106, § 19, 35, Laws of Fla.

In 1978, the Florida Medicaid Third-Party Liability Act, Ch. 78-433, Laws of Fla., statutorily subrogated the rights of individual Medicaid recipients to the Department of Health and Rehabilitative Services ("HRS") to "recover to the fullest extent possible the amount of all medical assistance payments made on behalf of the [Medicaid] recipient." § 409.266, Fla. Stat. (1978).

To strengthen the State's ability to recover Medicaid expenses from culpable tortfeasors, in 1982 the Act was again amended to require assignment of Medicaid claims to the State and to establish a lien on any third-party recovery. Ch. 82-159, Laws of Fla.

3. In 1990, the Act was comprehensively revised to facilitate the State's recoupment of Medicaid payments from liable third parties. At that time, the Legislature clearly and unequivocally expressed: "It is the intent of the Legislature that

Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients." § 409.2665(1), Fla. Stat. (Supp. 1990).[1] Notably, petitioners in this case have never challenged *any* of the provisions of the 1990 statute, under either the Florida or U.S. Constitutions.

The Florida Supreme Court recognized that the 1990 changes were "major amendments" that "strengthen[ed] the State's ability to recover funds expended for Medicaid costs." Pet. App. 3a. For example, a third party — the potential defendant in any action brought under the Act — was defined as:

> an individual, entity, or program, excluding Medicaid, that is, may be, or could be, should be, or has been liable for all of the cost of medical services related to any medical assistance covered by Medicaid.

§ 409.2665(3)(p), Fla. Stat. (Supp. 1990). As the Florida Supreme Court recognized, "[c]ertainly this broad definition of third parties covers tortfeasors that caused a Medicaid recipient's health problems." Pet. App. 14a.

In addition, the Supreme Court identified "significant changes to the State's traditional subrogation action" wrought by the 1990 Amendments. *Id.* at 15a. Contrary to petitioners' assertions that until 1994 the State had no independent right of recovery and simply stood in the shoes of the Medicaid recipient, under the 1990 legislation the State was afforded *four* statutorily recognized methods of recovery:

---

1 The 1990 Amendments were codified at Section 409.2665, Florida Statutes and subsequently renumbered in 1991 at Section 409.910, Florida Statutes.

> The department may, as a matter of right, in order to enforce its rights under this section, *institute*, intervene in, or join any legal proceeding in *its own name* in one or more of the following capacities: [1] *individually*, [2] as subrogee of the recipient, [3] as assignee of the recipient, or [4] as lien holder of the collateral.

§ 409.2665(12), Fla. Stat. (Supp. 1990) (emphases and bracketed numbers added). In addition, the 1990 law provided that:

> Principles of common law and equity as to assignment, lien, and subrogation are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third party resources.

§ 409.2665(1), Fla. Stat. (Supp. 1990).

The statute also provided that "[t]he department is a bona fide assignee for value in the assigned right, title, or interest, and takes vested legal and equitable title *free and clear of latent equities in a third-person*." § 409.2665(7)(b)(2), Fla. Stat. (Supp. 1990) (emphasis added). The 1990 law made it clear that these rights, "as to which the department may assert independent principles of law, . . . shall nevertheless be construed together to provide the greatest recovery from third-party benefits." § 409.2665(7), Fla. Stat. (Supp. 1990). Lest there be any doubt, the 1990 law expressly provided that "[t]he department shall recover the *full amount* of all medical assistance provided by Medicaid on behalf of the recipient to the *full extent* of third-party benefits" and that "[r]ecovery of such benefits shall be collected *directly* from" "[a]ny third party." § 409.2665(8)(a)(1), Fla. Stat. (Supp. 1990) (emphases added).

Thus, under the 1990 statute, never challenged by petitioners, the State had an independent statutory right directly to recover full payment from "any third-party"; a superior statutory subrogation right which placed its claim above all others; a statutorily created assignment right which the State took free and clear of any latent equities in a third person; and a lien right which gave the State a right of 100% recovery from the third party. These four statutorily created rights to recover full benefits were to be asserted in accord with "independent principles of law," which were to be "construed together to provide the greatest recovery." § 409.2665(7), Fla. Stat. (Supp. 1990).

In the decision below, the Florida Supreme Court recognized that "[i]t is clear that the 1990 legislation, *at the very least*, moves the State to the front of the line" vis-a-vis other innocent parties if any potential reimbursement monies become available. Pet. App. 15a (emphasis added).

4. By 1994, mounting Medicaid and other health care expenses in Florida led the state legislature to revisit the question of Medicaid cost recovery. In 1992, 28,350 Floridians died from tobacco-related causes, representing 77 preventable deaths every day or 20% of all deaths in the State.[2] Medicaid costs attributable to smoking in Florida from 1990 to1995 have been estimated at $1.4 billion.[3]

---

2 Florida Department of Health and Rehabilitative Services, State Health Office, Family Health Service, *A Florida Health Status Report: Behavioral Risk Factor Surveillance System 1986-1992*, 1994:9-12, *cited in*, J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No.5, *Tobacco Use in Florida: Consequences and Costs*, p. 442 (September/October 1994).

3 Florida Department of Health and Rehabilitative Services, *Smoking Attributable Mortality, Morbidity, and Economic Costs: 1992 Report*,

The legislative history of the 1994 Amendments reveals that they were the considered product of normal legislative deliberations. There was no effort to "sneak" the amendments into law. For example, the title of the bill containing the amendments provided a full and fair explanation of the provisions dealing with the State's claim for reimbursement against a liable third party:

> [An Act] relating to Medicaid provider fraud; [1] transferring responsibilities for administering the state Medicaid fraud-control program from the Auditor General to the Department of Legal Affairs; [2] creating s. 16.59, F.S. [3] establishing a Medicaid Fraud-Control office in the Department of Legal Affairs; [4] *amending ss. 409.910*, 409.913, F.S.; [5] incorporating conforming revisions [6] *broadening the scope of liability for which Medicaid payments must be repaid;* [7] *expanding causes of action*; [8] *providing for joint and several liability*; [9] *providing a cause of action for the agency*; [10] *deleting limitations on attorney representation*; [11] *allowing agency to consolidate cases into one proceeding*; [12] *defense of statute of repose does not apply to actions by agency brought under this section*; [13] *placing limitations on recipient's right to recover when recipient fails to intervene*; [14] amending s. 409.920; [15] conforming the transfer of duties and providing for assistance from any state attorney or law enforcement agency in

---

1994, *cited in*, J. Sims, Cancer Control, Journal of the Moffitt Cancer Center, Vol. 1, No. 5, *Tobacco Use in Florida: Consequences and Costs*, p. 442 (September/October 1994).

> investigating and prosecuting Medicaid fraud cases; [16] providing an effective date.

(emphases and bracketed numbers added). The April 7, 1994 Journal of the Senate, page 839, explains the circumstances of the bill's passage in the Senate:

> On a motion by Senator Foreman and by two-thirds vote, CS/CS/SB 2110 as amended was read the third time by title, passed, and ordered engrossed, and then certified to the House. The vote on passage was yeas - 38, nays - none.

The transcript of the tape of the House floor discussion of the bill (CS/CS/SB 2110) evidences dialogue among Representative Wallace (the Speaker of the House of Representatives), its Clerk, and Representative Graber regarding the proposal. Representative Graber explained:

> This is the transfer of the Medicaid Fraud Unit to the Attorney General's Office. It has come back with an amendment that broadens principles of recovery, scope of the State's independent cause of action and the State's ability to consolidate cases.

The Speaker inquired whether they were any "questions to the sponsor." There were none. The rules were waived and CS/SB 2110 was read a third time. The Speaker again inquired whether there were questions on the bill or debate. There were none. The bill passed by a vote of 118 yeas and zero nays.

After petitioners suggested in the Florida courts that the 1994 Amendments had been enacted without full compliance

with state legislative rules, the Secretary of the Senate examined all pertinent records, documents and tapes relating to the passage of the Amendments and certified to the Circuit Court of Leon County that there were no violations of the legislative rules.[4]

5. The Florida Supreme Court explained that, "[a]ssuming that the content of the 1990 Act is open to numerous interpretations, the 1994 amendments clarify the State's cause of action definitively." Pet. App. 15a. The 1994 Amendments make clear that the State's cause of action is not derivative in the nature of a subrogation, assignment, or lien. "Rather, it is a new independent cause of action that requires the State to prove: (1) either negligence or a defective product; (2) causation; and (3) damages." *Id.* at 16a.

The 1994 Amendments restated and expanded the language of the 1990 statute to make clear that affirmative defenses are abrogated to the extent necessary to ensure the State's direct recovery of sums owed to it. § 409.910(1), Fla. Stat. 1995. The 1994 Amendments also clarified that the State has the authority to pursue all related claims in one proceeding, § 409.910(9), Fla. Stat. 1995, and to "proceed to seek recovery based on payments made on behalf of an entire class of recipients," where the number of Medicaid recipients "is so large as to cause it to be impracticable to join or identify each claim." § 409.910(9)(a), Fla. Stat. 1995. The State was also given the power to use statistical evidence and theories of market share and joint and several liability. § 409.910(1), (9),

---

4 *See* Letter of Joe Brown, Secretary of the Senate, dated May 24, 1994, Exhibit B to the State's Opposition to Plaintiffs' Motion for Summary Judgment (filed June 14, 1995).

(9)(b), Fla. Stat. 1995. Also, as first expressed in 1990, the 1994 amendments to § 409.910(1) reiterate that common law principles of recovery should be liberally construed to effectuate the purposes of the Act.

6. After passage of the 1994 Amendments, the Governor of Florida announced his intent to recover Medicaid damages from the tobacco industry, and petitioners filed a declaratory judgment action in the Circuit Court of Leon County, Florida. Petitioners initially alleged that the 1994 Amendments were unconstitutional on their face. They subsequently amended their complaint to question the constitutionality of the structure of the Agency for Health Care Administration ("AHCA"), which was initially established in 1992. *See* Ch. 92-93, Laws of Fla. AHCA is the State's primary health care agency with responsibility to manage a $6.5 billion budget and oversee all health care services, including recoupment of Medicaid payments from liable third-parties.

The Circuit Court of Leon County held that the 1994 Amendments, including their abrogation of affirmative defenses, did not violate due process or the right of access to courts under the Florida Constitution. Pet. App. 44a-45a. The court further held that the 1994 Amendments fully complied with the legislative title requirements of the state constitution and were not pre-empted by federal law. *Id.* (Petitioners did not subsequently pursue these issues on appeal.) The court also held that the portions of § 409.910(9) of the Amendments dealing with joinder and identifying injured Medicaid recipients, as well as the portions of §§ 409.910(1) and 409.910(9) dealing with the interpretation of common law theories of recovery and the evidence code, infringed on the power of the judiciary and were invalid under the state constitution. *Id.* at 45a-46a. The court held that the 1994

Amendments could not be applied to conduct or activities that occurred before July 1, 1994 and could not be applied to revive time-barred claims under the Florida statute of repose. *Id.* The court also held that the structure of AHCA violated the Florida Constitution. *Id.* at 46a.

The Florida Supreme Court affirmed in part and reversed in part. The court held that the abrogation of affirmative defenses was not unconstitutional on its face, properly recognizing that "the judicial branch must be cautious when evaluating the choices made by the legislative branch as to the appropriate funding for programs it has deemed important to the public welfare." Pet. App. 2a. "We must avoid unnecessarily limiting the funding options available to the legislature when addressing today's policy problems." *Id.* The court found that the 1990 legislation represented "major amendments" that significantly strengthened the State's power to sue third parties to recover Medicaid costs. *Id.* at 3a. The court explained that the 1994 Amendments merely "clarify the State's cause of action definitively." *Id.* at 15a. The court also noted extensive precedent both from this Court and under the Florida Constitution permitting the state legislature to abrogate affirmative defenses. *Id.* at 18a-23a. The court emphasized that "[n]ot all tort actions carry with them the same elements or affirmative defenses." *Id.* at 32a.

The Florida Supreme Court further held that certain aspects of the 1994 Amendments were invalid under the Florida Constitution: (1) the authority to pursue an action without a mechanism for identifying individual Medicaid recipients; (2) the abolition of a statute-of-repose defense with respect to time-barred claims; and (3) the provision for combining the theories of market share liability and joint and several liability (although the court opined that "either theory may be used separately"). Pet. App. 2a. Finally, the court upheld the

constitutionality of AHCA under the Florida Constitution. *Id.* at 9a-13a.

Petitioners moved for rehearing, repeating many of the same arguments raised here. That motion was denied. Pet. App. 49a.

REASONS FOR DENYING THE WRIT

1. Certiorari should be denied because petitioners' arguments fail to raise an important question of federal law. The 1994 Amendments represent an eminently reasonable solution to pressing fiscal and health care problems confronting the State Medicaid program.

Tobacco companies, through the production, promotion and sale of their products, have knowingly created a massive public health crisis. The State, as guardian of the public health, has acted to meet this crisis through the provision of necessary medical treatment. In fulfilling its duty, the State has assumed a crushing financial burden — a burden which in all equity and fairness should be borne by those whose lucrative enterprise is responsible for the harm. The 1994 Amendments do not represent the radical departure from existing Florida law — or from traditions of common law and equity jurisprudence — that petitioners' claim. Rather, they represent a sound attempt to force tobacco companies and other liable parties to internalize some of the social costs of their tortious behavior.

In fact, Congress itself requires States participating in the Medicaid scheme to seek to collect that money from liable third parties, although the federal government does not prescribe precisely how the State is to do so. The federal Medicaid statute provides in pertinent part:

> [that] a state plan for medical assistance must . . . provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan; and (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C. § 1396a(a)(25). In adopting the 1994 Amendments, the Florida legislature was acting to implement this congressional mandate.[5]

"[T]he judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that do not affect fundamental rights or proceed along suspect lines." *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). In particular, a legislature is free to abolish affirmative defenses and create new liabilities without violating due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Martinez v. California*, 444 U.S. 277, 281-83 (1980). A defendant "has no vested right to have . . . common-law defenses perpetuated for his benefit." *Hawkins v. Bleakly*, 243 U.S. 210, 213 (1917); *see also New York Central Co. v. White*, 243 U. S. 188, 198 (1917) ("No person

---

5 The state circuit court in this case ruled that the federal Medicaid statute does not prescribe subrogation as the exclusive means by which a State may recover Medicaid costs and thus does not pre-empt the Florida law in this regard. Pet. App. 45a. Petitioners did not challenge this ruling before the Florida Supreme Court, nor do they raise a pre-emption issue in their petition for certiorari.

has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.") (collecting cases); *Branch v. United States*, 69 F.3d 1571, 1577-58 (Fed. Cir. 1995) ("[A] legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property. The reason, the Supreme Court has explained, is that no one is considered to have a property interest in a rule of law."), *cert. denied*, 117 S. Ct. 55 (1996).

2. Petitioners complain that it is "'wholly arbitrary and irrational'" to permit the State to abrogate common law defenses in Medicaid cost recovery actions "based solely on the happenstance that the *State* seeks recovery." Pet. 13, 15 (citation omitted and emphasis in original).

At the outset, it is important to note that petitioners are forced to rely on groundless hyperbole and a distortion of both the 1994 Amendments and the history of Florida's legislative efforts to assure full recovery of Medicaid costs from culpable third parties.

a. Petitioners assert that "[i]t as though the State has declared that in football league games, when the State's university team's offense is on the field, the opponent's defense must withdraw to the sidelines." Pet. 11. Petitioners insist that there are "'no significant constraints or protections against arbitrary results'" in the 1994 Amendments. Pet. 14 (citation omitted).

To the contrary: The Florida Supreme Court made clear that the State is required to prove "(1) either negligence or a defective product; (2) causation; and (3) damages." Pet. App. 16a. Further, the court held that defendants have the right "to challenge improper payments" made in the Medicaid program.

Id. at 25a. Statistical evidence may be used by the State only within the bounds of existing procedure and rules of evidence. *Id.* at 30a.

Petitioners utterly fail to demonstrate how these safeguards will prove inadequate to guard against "arbitrary results." Indeed, under petitioners' view, the State of Florida would be on sounder constitutional ground if it eliminated common-law affirmative defenses in *all* litigation involving dangerous or defective products, rather than adopting what petitioners portray as an unprincipled exception for Medicaid cost recovery suits brought by the State. Thus, petitioners' own preferred solution is one that would expose them to even greater liability.

b. Petitioners claim that the 1994 Amendments create a special rule for the State in Medicaid recovery actions. The Florida Supreme Court held that this is not so. The court found that the Amendments "merely treat[] the State as any other faultless plaintiff would already be treated under current Florida law." Pet. App. 32a. The court compared the 1994 Amendments to the existing rule of joint and several liability in Florida, under which a plaintiff may recover all damages from any of multiple defendants even though the particular defendant selected may be the least culpable defendant in the case. *Id.* (citing Fla. Stat. § 768.81(3)). "[T]he Act simply recognizes the State as an entity analogous to the faultless plaintiff above." *Id.* The Amendments allow the State "to collect one hundred percent of the damages from a culpable third party even if another party might be considerably more culpable." *Id.*

Further, petitioners' claim that the 1994 Amendments "worked a monumental change in pre-existing State law" (Pet. 5) is simply unsustainable in light of the 1990 statute. The

1994 Amendments did not introduce the idea of an independent action by the State. They did not make culpable acts that were innocent when undertaken. They merely "clarif[ied]" — in the words of the Florida Supreme Court, Pet. App. 15a — preexisting Florida law to make explicit that potential third-party defendants are liable to the State for Medicaid payments attributable to the harm caused by their dangerous or defective products. It was the 1990 amendments — which petitioners did not challenge below and have not sought to challenge here — that initially created special powers and preferences in favor of the State. Indeed, the 1990 Act encompassed some twelve pages of session law and supplanted section 409.266(4), Florida Statues, a one-page section of the "Medical Assistance" statute. In contrast, the 1994 Amendments, which if stacked on end yield less than two pages, simply fine-tune the 1990 vehicle to make it more efficient in carrying out the federal and state policy of full recovery from all liable third-party sources.

Accordingly, the entire premise of petitioners' argument is simply incorrect.

3. In any event, even if the 1994 Amendments *had* created the special rule that petitioners claim, the Florida legislature could reasonably have found that there are important differences between Medicaid cost recovery suits by the State and private litigation.

States are not similarly situated to individual users of the dangerous or defective products in question. States did not assume any of the risks of tobacco: they did not inhale.

When a tobacco company sells its products to consumers, it is foreseeable that many will become ill and that the State will thereupon be called upon to pay a portion of the resulting medical costs. The State is an innocent third party that has

been forced to pay enormous sums which should in equity have been borne by the tortfeasors. Whether an individual smoker has assumed the risk of smoking is simply immaterial to the tobacco company's liability to the *State*. States are not participants in the enterprise that has caused them, collectively, to incur billions of dollars in health care costs. They have instead been compelled unfairly to subsidize the externalities of tortfeasors' activities, to the great detriment of state taxpayers, citizens, and businesses. As between wrongdoers and the State, the former should bear the cost of the injuries attributable to their tortious activities

Nor is the State comparable to a private insurance company:

> [T]he relationship between a hospital receiving reimbursement under Medicaid or Medicare and the government is not analogous to an insurance contract. Medicare and Medicaid are not funded by beneficiaries' premium payments, but by a payroll tax. This is not the form of conventional insurance.

United States v. University Hospital, 575 F. Supp. 607, 613 (E.D.N.Y. 1983). Unlike an insurer, the State does not make a profit from its medical assistance. It exercises its sovereign authority to tax the citizenry and expend such funds for the benefit of all of its citizens. In addition, the State has the right through its quasi-sovereign authority to pursue a cause of action against a wrongdoer who by its action does damage to "a set of interests that the State has in the well-being of its populace." *Alfred L. Snapp & Son, Inc., v. Puerto Rico*, 458 U.S. 592, 602 (1982). Obviously, an insurance company has no such responsibility to the public welfare.

The caselaw reflects these vital distinctions. If insurance is provided by contract, where a risk is assumed for a fee or premium, the insurer may be entitled only to be subrogated to the claims of the insured. The remedy is entirely different, however, when the "insurer's" obligation is imposed by law or statute. In that case, the insurer is entitled to the equitable remedies asserted by the plaintiff here, which are broader than subrogation. As one court explained:

> [S]ince the insurer's obligation to pay is due solely to its *contract*, it presumably received consideration for agreeing to bear the risk; allowing indemnity gives the insurer a windfall. Implied indemnity is not intended for such persons. As a general rule, "[t]he right to indemnity inures to a person who, without active fault on his part, is compelled *by reason of legal obligation* or relationship to pay damages which have been caused by the acts of another."

Industrial Risk Insurers v. Creole Production Serv., 746 F.2d 526, 528 (9th Cir. 1984) (emphasis added and citation omitted); *see also Great American Ins. Co. v. United States*, 575 F.2d 1031, 1034-35 (2d Cir. 1978) ("Appellant here has confused the principle of indemnity which underlies subrogation with an implied action for indemnification — which is completely distinguishable. . . . The insurance carrier's relationship with his insured is not one imposed by operation of law or statute; it is a contractual relationship in which the carrier has deliberately accepted a risk for a fee.").

Indeed, the differences between the State and private litigants are so apparent that a Mississippi court has held that, *even in the absence of a statute* like the one enacted in Florida, a State is not a subrogee and is not subject to the affirmative

defenses that might be asserted against individual smokers in product liability actions. Order of Feb. 21, 1995, *Moore ex rel Mississippi v. The American Tobacco Co.*, No. 94:1429 (Ch. Ct., Jackson Co., Miss.).

4. Congress has made the same policy judgment as the Florida legislature. The Medical Care Recovery Act, 42 U.S.C. § 2651, enables the United States Government to seek reimbursement for medical costs incurred by federal agencies, without being subject to all of the affirmative defenses that a subrogee would face. The Act provides in relevant part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished. . . The United States may, to enforce such a right, (1) intervene or join any action or proceeding brought by the injured or diseased person . . . against the third person who is liable for the injury or disease; or (2) . . . *institute and prosecute legal proceedings against the third person* in state or federal court, *either alone* (in its own name or in the name of the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors) *or in conjunction with the injured or diseased person*, his guardian, personal representative, estate, dependents, or survivors.

(emphasis added). Under the Act, the federal government may assert a direct action for reimbursement without being bound by affirmative defenses that might preclude suit by the individual injured victim. *See, e.g., Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 419 (D.C. Cir. 1994) (noting that the "government's independent right of action entitles it to full recovery even where [the] tort victim's right would be limited by comparative negligence"); *Holbrook v. Anderson Corp.*, 996 F.2d 1339, 1341 (1st Cir. 1993) (government has "an independent right of recovery against the tortfeasor" and "is not defeated even by certain restrictions that might bar the injured person's own recovery"); *United States v. Theriaque*, 674 F. Supp. 395, 398 (D. Mass. 1987) (government is not merely a subrogee in suits brought under the Medical Care Recovery Act, but has an independent right to sue the tortfeasor); *see also United States v. Gera*, 409 F.2d 117, 119-20 (3d Cir. 1969); *United States v. Merrigan*, 389 F.2d 21, 22 (3d Cir. 1968); *United States v. Hunter*, 645 F. Supp. 758, 759 (N.D.N.Y. 1986); *United States v. Moore*, 311 F. Supp. 984, 985 (D. Pa. 1970), *rev'd on other grounds*, 469 F.2d 788 (3d Cir. 1972).

5. In fact, there are many instances in the law where parties akin to the State here are able to sue in indemnity, for restitution, or on similar equitable or legal grounds without being subject to otherwise applicable affirmative defenses. Far from being arbitrary or even very unusual, the 1994 Amendments simply apply these altogether familiar principles in a context where the State is suing as an innocent party wrongfully forced to bear Medicaid costs that it seeks to prove are in fact attributable to culpable tortfeasors.

For example, many workers' compensation statutes do not bar third party actions for implied indemnity. That is, when an

injured employee brings a tort suit against the manufacturer of a defective product that caused the on-the-job injury, the fact that the employee's action against the employer is barred by a workers' compensation Act does not preclude the manufacturer's third-party action against the employer for indemnification.[6] Similarly, many courts have allowed third-party actions against tortfeasors protected from a first-party suit by interspousal or intrafamilial immunity.[7] Further, third-party indemnity actions are not precluded by the expiration of the injured party's statute of limitations against the defendant, indicating that the indemnity action does not depend upon the viability of the originally injured party's claim.[8] And direct actions by third parties have been allowed in many other contexts despite the existence of affirmative defense that would preclude the tortfeasor's immediate victim from bringing suit successfully.[9]

---

6 *E.g., Oaklawn Jockey Club, Inc. v. Pickens-Bond Construction Co.*, 477 S.W.2d 477, 478 (Ark. 1972); *Trail Builders Supply Co. v. Reagan*, 235 So.2d 482, 485 (Fla. 1970); *Skinner v. Reed-Prentice Division Package Mach. Co.*, 374 N.E.2d 437, 443 (Ill. 1977); *Miller v. De Witt*, 226 N.E.2d 630, 640 (Ill. 1967); *Ashland Oil and Refining Co. v. General Telephone Co.*, 462 S.W.2d 190, 193-94 (Ky. Ct. App. 1970); *Dale v. Whiteman*, 202 N.W.2d 797, 800-02 (Mich. 1972); *Sommer v. Federal Signal Corp.*, 593 N.E.2d 1365, 1373-74 (N.Y. 1992).

7 *Joseph v. Quest*, 414 So.2d 1063, 1064-65 (Fla. 1982); *Shor v. Paoli*, 353 So.2d 825, 826 (Fla. 1978); *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 174 So.2d 122, 125 (La. 1965); *Zarrella v. Miller*, 217 A.2d 673, 675 (R.I. 1966); *Bishop v. Nielsen*, 632 P.2d 864, 866 (Utah 1981).

8 *See When Statute of Limitations Commences to Run Against Claim For Contribution or Indemnity Based on Tort*, 57 A.L.R. 3d 867, 881-884 (1996).

9 *E.g., Westchester Light Company* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 180, 15 N.E.2d 567, 568 (N.Y. 1938) ("Recovery

6. Petitioners' legal authorities are inapposite. Petitioners rely primarily on cases involving contract to which governments are parties. Pet. 11-12 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *United States v. Winstar*, 116 S. Ct. 2432, 2465 (1996)). These cases are irrelevant here, for the State is not seeking to interpret a contract it has drafted, nor is it attempting to breach a contract with petitioners. The Contract Clause does not limit the State's police power in this context.[10]

("Recovery over against the employer in an unusual case like this need not be rested upon any theory of subrogation. An independent duty or obligation owed by the employer to the third party is a sufficient basis for the action."); *Jones v. Kinney*, 113 F. Supp. 923, 924-25 (W.D.Mo. 1953) (wife could maintain lawsuit against husband's employer, and employer could maintain third-party action against husband, despite rule preventing spouses from suing one another in tort).

10 "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v. Springs*, 199 U.S. 473, 480 (1905); *see also General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) (upholding retroactive change in workers' compensation law because employers "knew that they were taking a risk in reducing benefits . . . , but they took their chances"); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (upholding imposition of oil and gas severance tax specifying that producers could not pass on tax directly or indirectly to consumers, regardless of what private contracts provided).

The general principle of "self-dealing" that petitioners seek to extract from the contract cases (Pet. 14) is not sustainable in light of the many special powers enjoyed by the States, including sovereign immunity, eminent domain, and the authority to raise revenue. The exercise of any of these powers has never been thought to trigger "heightened scrutiny."

7. Review should also be denied because petitioners have brought a facial challenge to the Amendments. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987).

This burden cannot be met here. At most, petitioners have identified only the possibility of abuse in particular instances in which the statute might be applied. In the decision below, the Florida Supreme Court explicitly and repeatedly recognized that any constitutional difficulties presented by the 1994 Amendments could be addressed on a case-by-case basis in litigation brought by the State to recover Medicaid costs. *See* Pet. App. 2a ("a ruling of facial constitutionality does not preclude a later action challenging the manner in which the Act is applied"); *id.* at 18a ("any such [due process] problems will arise in the application of the Act's provisions. We are not currently faced with that issue. On its face, the provision allowing for the abrogation of affirmative defenses is constitutional under both the federal and Florida constitutions."); *id.* at 23a ("we rule that the Act's abrogation of affirmative defenses is facially constitutional. We emphasize, however, that Florida courts will remain free to hear challenges to the actual application of such abrogation.");

id. at 24a-25a ("To recap, we hold that the provision abrogating affirmative defenses is facially constitutional. We do not address whether the provision will always survive a constitutional due process attack as to its application. It would be inappropriate to speculate as to such application. . . . Further, any speculation as to the application of this provision would be flawed because we have no record containing facts, evidence, or expert opinions.").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

Laurence H. Tribe
Jonathan S. Massey
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Wayne Hogan
Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel
233 East Bay Street
Jacksonville, FL 32202
(904) 632-2424

W.C. Gentry
Gentry and Phillips
6 East Bay Street, Ste. 400
Jacksonville, FL 32202
(904) 356-4100

February 6, 1997

Robert A. Butterworth
Attorney General
Counsel of Record
The Capitol, Ste. PL-01
Tallahassee, FL 32399
(904) 488-9935

Dexter Douglass
General Counsel
Executive Office of the Governor
The Capitol, Ste. 209
Tallahassee, FL 32399
(904) 488-3494

Parker D. Thomson
Thomson, Muraro, Razook & Hart, P.A.
One Southeast Third Avenue
Miami, FL 33131
(305) 350-7200